camp supervisor who had certified that all timber from the area had been extracted and those left unextracted were in area not accessible by tractor. Appellant was asked to settle the final payment of $11,000. By the last paragraph respondents made this offer:—

"But, should you still insist that there is still valuable timber left there in the camp to be extracted we are quite willing to offer our camp manager to check the area with your man. And if it is found there is some more timber to be worked, then we shall continue to complete the same for you under the same terms and conditions. This suggestion is made completely without prejudice of our claim of payment and our belief that the area has been worked and completed and whatever left remaining is not accessible by us."

Appellant's camp supervisor clearly appreciated the impossibility of working in such inaccessible area. After all, he had inspected the area with respondents' camp supervisor to satisfy himself that the area was really inaccessible by tractor and impossible to work the timber. The continuance of a contract must depend upon the possibility of performance. Respondents could not be regarded as having promised to perform an impossibility. I could do no better than to quote Lord Watson in *Dahl* v. *Nelson*[1] when he said:—

"... the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and sensible men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

Having regard to all these the learned judge came to the conclusion that respondents had totally performed their contract and therefore were not in breach of the contract. With respect, he is right.

Another matter which the learned judge took into consideration is the drop of timber price at the relevant date. Both parties did not dispute that timber industry went into recession in 1974 on account of inflation in April or May, 1974. There was evidence that respondents would not be paid for timber which were considered of no commercial value. The learned judge was of the view that it would be reasonable for respondents to stop the extraction of timber at the relevant date since the timber had ceased to become commercial and they would not be paid for their services.

The learned judge found that respondents had extracted over 89,000 cubic feet of timber which they hauled to the collecting point on land by tractor. Out of these, 17,900 cubic feet were transported by appellant to the dumping point at the river bank. Appellant made use of three lorries for this purpose. He owned one lorry and hired the other two. Respondents were paid by appellant for the remaining 71,982 cubic feet of timber left at the collecting point (See Exhibit P1). Appellant said that he transported the timber to the river bank for respondents and that he paid respondents on the remaining logs as advance to be accounted later. The learned judge quite rightly pointed out that appellant had contradicted himself when he requested respondents to return by his letter dated May 21, 1974, referred to earlier, to complete the works "of hauling and loading of timber logs in order to enable me to transport them into the dumping point."

It seems to me the appellant has not discharged the onus on the balance of probabilities. The learned judge has the advantage of seeing and hearing the witnesses and would be in a better position to assess their credibility. On the finding of facts the appellate court would therefore be slow to intervene. I cannot say that the learned judge was wrong in dismissing the counterclaim in that the respondents had not breached the contract as they had performed it. I would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Ong Hock Sim F.J. and **Charles Ho J.** concurred.

Appeal dismissed.

Solicitors: *Peter Kuok & Co.; William Liaw & Co.*

SABLI BIN ADIN & ORS. v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) (October 3 and December 29, 1977]

[Kota Kinabalu — Federal Court Criminal Appeal Nos. 6 and 8 of 1977]

Criminal Law and Procedure — Rape — Girl under 14 years of age — Evidence uncorroborated — Cautioned statements inadmissible — Failure of justice — Penal Code s. 376 — Courts of Judicature Act, 1964, s. 60(1).

Penal Code, s. 376 — Rape — Girl under 14 — Evidence uncorroborated.

This was an appeal against convictions of rape. The girl was under 14 years of age and her evidence was uncorroborated. Cautioned statements were taken from the appellants but "no trial within a trial" was held to decide on their admissibility. The learned judge ruled them admissible after written submissions on admissibility were handed in by defence counsel and the Deputy Public Prosecutor.

Held, allowing the appeal: (1) the evidence of the complainant was uncorroborated and there were serious and grave discrepancies in the evidence;

(2) the cautioned statements should not have been admitted in evidence without a "trial within a trial;"

(3) there had been a failure of justice and the proviso to section 60(1) of the Courts of Judicature Act, 1964 could not be invoked.

FEDERAL COURT.

Abdul Razak Rouse for the appellants.

Abdul Wahab Patail (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim F.J. (read by Lee Hun Hoe C.J. (Borneo) delivering the judgment of the Court): The four appellants were convicted of rape under section 376 of the Penal Code. They appeal to us against both conviction and sentence. The victim was born on April 18, 1963 according to birth certificate produced as Exhibit P3 and no question of her consent to the alleged acts arises.

The only evidence as to the involvement of the appellants in the offences charged was given by her, and whether it was or was not to be expected, there were serious and grave discrepancies. The offences were alleged to have occurred on July 18 and July 19, 1976. The medical officer who examined her said that "the bruise could have been made any time *before*

one week or 10 days as from the date of my examination which is on July 24, 1976. This bruise could be found after a sexual act." That would be July 17, or earlier than the reported dates of the incident. Two reports were tendered by the medical officer and we refer to the first. "The history as given by the father was that she had sexual intercourse *with a man* on the night of July 18, 1976 and July 19, 1976" and to the second "with a history of having had sexual intercourse on July 18, 1976 and July 19, 1976 *with several men.*" It is somewhat strange that the doctor did not mention of detection of any blood. According to the father, she was bleeding from the vagina on July 24 which was why he took her to the doctor. The girl herself said "on July 24 my father took me to the hospital because he saw blood. I had menses. It was profuse." Equally strange was the fact that if she was, prior to July 18, a virgin, no bleeding followed the intercourse. This appears from the evidence and on the two occasions after the acts of intercourse she put on her panties. No evidence was given of any soiling of the underpants.

It is significant she made no complaint after the incidents of July 18. On July 19, it was only when she was discovered missing from her uncle's house and both he and her father found her some distance from the house that she appeared to be distressed. We think that condition was because her disappearance had been reported by the uncle's son Mohd. Yacob (PW7). It must be a source for wonder that after the incident of July 18, she was prepared to leave her uncle's house with Mohd. Ali and PW7 said "Arisih met Ali at the steps.... They walked together and talked."

Other than her uncorroborated evidence, which called for extreme gullibility to accept, the prosecution evidence relied on cautioned statements taken from the appellants. The appellants, in our view, could not have used the language appearing therein. They were hardly of the type to refer to 8 p.m. as 2000 hours. We find one serious objection to reliance on these statements in support of the conviction in that "no trial within a trial" was held. The learned judge ruled them admissible after written submissions on admissibility were handed in by learned defence counsel and Deputy Public Prosecutor. We do not think we can invoke the proviso to section 60(1), as we consider there has been a failure of justice.

We accordingly set aside the conviction and sentence on all the appellants.

Appeal allowed.

Solicitors: *Rayner & Co.*

CHING YUEN TUNG v. BEP AKETIK

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) October 3 and December 29, 1977]

[Kota Kinabalu — Federal Court Civil Appeal No. 37 of 1977]

Contract — Agency — Allegation that person is authorised overseas agent — Whether personally liable.

Agency — Authorised overseas agent — Contract — Liability.

The respondents had been engaged to make a valuation of land for the appellant in respect of Po Hing Estate and had been paid by the appellant with a cheque issued by Po Hing Enterprise. The respondents were also asked by the appellant to do a valuation of a proposed industrial site at Sandakan. A copy of the report was at the request of the appellants sent to the Executive Vice-President of a company in New York. The respondents claimed payment but the appellant said that he was merely acting as the authorised overseas agent for the company in New York. At the trial the only evidence was given on behalf of the respondents and the appellant alleged that the respondents had not proved their case on the balance of probabilities. The appellant relied on the claim that he was the authorised overseas agent for the company in New York. The learned trial judge gave judgment for the respondents. The appellant appealed.

Held, dismissing the appeal: as in this case the learned judge was satisfied that the respondents had proved their case he was bound to enter judgment against the appellant. The learned judge was right to hold the appellant personally liable in the light of the evidence.

Cases referred to:-

(1) *Higgins* v. *Senior* (1841) 8 M & W. 834.

(2) *Calder* v. *Dobell* (1871) L.R. 6 C.P. 486.

(3) *Basma* v. *Weekes & Ors.* [1950] A.C. 441.

(4) *Rusholme Ltd.* v. *S.G. Read Ltd.* [1955] 1 All E.R. 180, 183.

FEDERAL COURT.

Ian Chin for the appellant.

C.I. Robertson for the respondents.

Lee Hun Hoe C.J. (Borneo): This appeal against the decision of the learned judge is concerned with the question of agency.

Respondents are architects with their head office in Kuala Lumpur and a branch office in Kota Kinabalu. Appellant purported to be the authorised overseas agent of Continental Development Company of New York (to be referred to as "CD.Co."). Samuel Li Kwan Yuk (PW1), an associate of the respondents' firm in Sabah, testified that he had done a valuation for appellant in respect of Po Hing Estate in 1968 but which was completed some time in 1969. On June 18, 1969 appellant spoke to him, among other matters, the preparation of an industrial lot in Sandakan and told him that the terms of engagement would be similar to that of Po Hing project. Consequently, by a letter bearing the same date appellant wrote to respondents as follows:—

"Sandakan 18th June, 1969.

Messrs. Booty Edward & Partners,
P. O. Box 840,
Kota Kinabalu.

Dear Sirs,

With reference to our telephonic conversation this morning, I write to confirm your appointment as the Appraiser to produce a report on the Proposed Light Industrial Site at L.20828 at Mile 2¼, North Road, Sandakan, giving valuations as follows:—